133

(1)

Supreme Court, U.S.
FILED
MAY 20 2009
OFFICE OF THE CLERK

No. 09-92

In the

Supreme Court of the United States

Jeffrey and Laura Davis,
Petitioners.

v.

Commissioner of Internal Revenue,
Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Robert Alan Jones,
R.A.J. Limited, P.C.
1061 E. Flamingo Road,
Suite 7
Las Vegas, NV 89119
(702) 791-3403

Petitioner, and
Attorney for Petitioners

QUESTIONS PRESENTED

I. Whether the United States Tax Court and the United States Sixth Circuit Court of Appeals denied Mr. Jeffrey Davis procedural due process by considering matters outside of the record in reviewing the Tax Court petition filed by Mr. Robert Alan Jones on the Davis' behalf?

II. Whether the United States Tax Court and the United States Circuit Court of Appeals mistakenly ruled that Mrs. Laura Davis' claim of expiration of the assessment statute of limitations in the collection due process hearing went to the "underlying liability," rather than was an appealable procedural defect?

III. Whether Mrs. Laura Davis' claim of "innocent spouse" over which the United States Tax Court had original jurisdiction was properly the subject of a petition in the Tax Court when denied by the CDPH settlement officer, and if so whether that permitted a joint petition with her husband to the Tax Court under the provisions of 26 U.S.C. §6330?

LIST OF PARTIES

All parties do not appear in the caption of the case on the title page. Counsel for Petitioners, Robert Alan Jones although not an original petitioner in the Tax Court, is also a Petitioner in the instant case due to the sanctions imposed upon him.

RULE 29.6

All petitioners, pursuant to Rule 29.6, state that they are unaffiliated with any public company and/or public stock.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Rule 29.6 iii

Table of Authorities vi

Opinions Below 1

Statement of Jurisdiction 2

Relevant Provisions Involved 2

Statement of Facts 4

Reasons for Granting the Petition 9

Conclusion 19

Appendix* - *in alphabetical order

Sixth Circuit Court Order (11/14/2008) A-1

Sixth Circuit Court Order Denying Petition for Rehearing en banc (2/19/2009) A-11

Tax Court Decision Doc. Docket No. 144-05L (2/28/2006) A-13

Tax Court Decision Doc.
Docket No. 145-05L (2/28/2006) A-15

Tax Court Decision Doc.
Docket No. 146-05L (2/28/2006) A-19

Tax Court Decision Doc.
Docket No. 147-05L (2/28/2006) A-24

Tax Court Decision Doc.
Docket No. 149-05L (2/28/2006) A-29

Tax Court Memorandum Opinion
T.C. Memo 2007-201 (7/24/2007) A-34

Tax Court Order
(consolidated) (2/28/2006) A-76

Tax Court Orders(7/25/2007) A-78

Tax Court Order and Decisions (7/27/07) A-88

Transcript Excerpts (2/28/2006) A-98

TABLE OF AUTHORITIES

Page

Cases

Blocker v. Commissioner,
T.C. Memo. 2005-279 . . . . . 16, 17

Burnet v. Sanford & Brooks Co.,
282 U.S. 359, 363 (1931) 13

Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152, 1159 (1993) . 15

Commissioner v. Lester,
366 U.S. 299, 304 (1961) 15

Commissioner v. Lundy,
516 U.S. 235, 249-250 (1996) 15

Eby v. Internal Revenue Service, 2006 U.S. Dist. LEXIS 14590 (S.D. Ohio 2006) 16

Edelson v. Commissioner, 829 F.2d 828, 834
(9th Cir. 1987) 14

Erlenbaugh v. United States,
409 U.S. 239, 244 (1972) 15

Estate of Wenner v. C.I.R., 116 T.C. 284, 286, U.S.T.C. 2001 . . . . . 18, 19

Florida Power & Light Co. v. Lorion,
470 U.S. 729, 744 (1985) 11

Goldston v. United States, 104 F.3d 1198,
1199-1201 (10th Cir. 1997) 14, 15

Hoffman v. Commissioner,
119 T.C. 140 (2002) 16

Jensen v. Commissioner,
T.C. Memo. 2004-120 ..... 16, 17

Kindred v. Commissioner, 454 F.3d, 688, 694
(7th Cir. 2006) 12, 16

Marvel v. United States, 719 F.2d 1507, 1514
(10th Cir. 1983) 14

Mlay v. Internal Revenue Service, 168F.Supp.2d
781, 786-787 (U.S.D.C. S.D. OH 2004) 19

Pomerantz v. Commissioner,
T.C. Memo. 2005-295 16

Robinette v. Commissioner, 439 F.3d 455
(8th Cir. 2006), rev'ing
123 T.C. 85 (2004) 9, 10, 16

Sorenson v. Secretary of the Treasury,
475 U.S. 851, 860 (1986) 15

United States v. Dale, 782 F. Supp. 615, 624
(D.D.C. 1991) 14

United States v. Dixieline Financial, Inc.,
594 F.2d 1311, 1312 (9th Cir. 1979) 14

United States v. Latham,
754 F.2d 747, 750 (7th Cir. 1985) 14

United States v. Regan, 713 F. Supp. 629, 633
(S.D.N.Y. 1989) 14

Statutes

26 U.S.C. §6013(e) 19
26 U.S.C. §6015(b)(1)(E) 19
26 U.S.C. §6015(e) 18
26 U.S.C. §6320 ..... 3, 10, 17
26 U.S.C. §6321-6327 17
26 U.S.C. §6330 ..... 2, 10, 15, 17
26 U.S.C. §6330(c)(2)(A) 17
26 U.S.C. §6330(c)(2)(B) 13, 16
26 U.S.C. §6501(a) 14, 15, 16
26 U.S.C. §6673(a)(1) 5
28 U.S.C. §1254(1) 2

Other Authorities

Administrative Procedures Act (APA) 10, 11, 20

IRS Restructuring and Reform Act of 1998,
Pub. L. 105-206, 112 Stat. 685 15

United States Constitution, Amendment V 2, 11

Webster's II New College Dictionary 16

In the

Supreme Court of the United States

Jeffrey and Laura Davis,
Petitioners.

v.

Commissioner of Internal Revenue,
Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Robert Alan Jones, and Mr. and Mrs. Davis respectfully pray that a writ of certiorari is issued to review the decision of the Sixth Circuit Court of Appeals entered November 14, 2008.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 301 Fed.Appx. 398 (C.A. 6). The opinion of the United States Tax Court is reported at T.C. Memo. 2007-201.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States Tax Court was handed down on November 14, 2008. Its Order Denying the Petition for Rehearing *en banc* was issued on February 19, 2009.This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V

"No person shall be held... nor be deprived of life, liberty, or property, without due process of law."

Internal Revenue Code, 26 U.S.C. §6330

(a) Requirement of notice before levy.--

> **(1) In general.**– No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.
>
> **(3) Information included with notice.**– The notice required under paragraph (1) shall

include in simple and nontechnical terms–

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period under paragraph (2);

(b) Right to a fair hearing.--

(2) One hearing per period.–A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial officer.–The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A taxpayer may waive the requirement of this paragraph.

(c) Matters considered at hearing.–In the case of any hearing conducted under this section–

(1) Requirement of investigation.–The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) Issues at hearing.--

(A) In general.–The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including–

(i) appropriate spousal defenses;
(ii) challenges to the appropriateness of collection actions; and
(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) Underlying liability.–The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

STATEMENT OF FACTS

Jeffrey and Laura Davis underpaid their joint federal income taxes in 1997, 1998, and 1999 by diverting their income through a business trust. The trust also underpaid its taxes in 1999. Upon

discovering the underpayments, the Internal Revenue Service sent statutory notices of deficiency to both the Davises and the trust. These notices provided the Davises with an opportunity to challenge the alleged deficiencies in the United States Tax Court.

Jeffrey Davis, but not Laura, filed a challenge with respect to the 1997 and 1998 deficiencies. The issuance of the statutory notice and the filing of the petition by Jeffrey Davis had the effect of tolling the statute of limitations for assessment of the tax against him for the period from the issuance of the notice to a date one hundred and fifty (150) days subsequent to the final decision of the Tax Court. This did not occur for some two and one half years.

However, Mrs. Laura Davis did not petition the Tax Court and as a result, the statute of limitations for assessment of the 1997 and 1998 taxes against her was tolled only for the period of the ninety day letter, plus sixty days necessary thereafter to enter an assessment against her. In effect the expiration of the statute of limitations against Laura Davis was not extended for the period of time her husband's case was being processed in the Tax Court.

Jeffrey Davis on the other hand, after petitioning the Tax Court, and following his attorney's withdrawal from the case, failed to prosecute his petition or to answer the Commissioner's discovery requests. After some two years, a default was entered against him.

In that previous case the Tax Court upheld the IRS's determination and also imposed a $25,000 penalty on Davis pursuant to 26 U.S.C. §6673(a)(1) for instituting or maintaining the case primarily for delay. (That is not the sanction at issue here.) Davis did not appeal, and a personal tax assessment was entered against him, and one against his wife at approximately the same time. The assessments were for all three tax years and included the business trust.

The Davises did not pay the assessments. As a result, the IRS sent them a "Final Notice - Notice of Intent to Levy and Notice of Your Right to a Hearing," for each tax deficiency. In response, the Davises retained Jones as their attorney, and requested a Collection Due Process (CDP) hearing. They alleged the existence of "impermissible whipsaws," and claimed that Laura Davis was "an 'innocent spouse.'"

The IRS Settlement Officer for the case, Michael Freitag, set the CDP hearing date for July 19, 2004. At Jones's request, Freitag postponed the hearing until August 24, 2004. Jones failed to appear on that date. The hearing was eventually held by telephone on September 7, 2004.

At the hearing, Freitag found that, by statute, the Davises and the trust could not contest their underlying tax liability because each had received a notice of deficiency and because the Tax Court had already determined that Jeffrey Davis was liable for payments in tax years 1997 and 1998. What he failed to consider even though it was pointed out in the

hearing request is that the statute of limitations against Mrs. Davis had expired by almost two years (because it was not tolled by an intervening tax court petition).

Although Freitag also noted that he could not consider any collection alternatives because the Davises had not presented any, he did not consider that the tax imposed upon the trust, and separately upon both the husband and the wife amounted to multiple taxes on the same income. Freitag issued notices of determination sustaining the government's filings and all proposed tax levies.

The Davises then filed petitions for review of that ruling in the Tax Court. Finally, they claimed that the assessments violated the statute of limitations, and that Laura Davis was an "innocent spouse."

At the hearing on February 28, 2006 before the Tax Court, the Court set out its position with regard to sanctions against Petitioners and/or their counsel:

> THE COURT: I would just clarify one more time that the Court's focus is on the language of the petition, the language of the amended petition, the language of the objection and the merit of the claims made therein and whether those claims have merit or are groundless or were groundless or were instituted solely for delay. The Court is not concerned with anything beyond the specific claims made (See Tr. 15, lines 17-23; Appendix: A-69).

The Court did not follow its own ruling at the trial disposition hearing (See 1&2 transcript excerpts A-68-69), but rather improperly relied upon dubious discovery in Mr. Davis' previous Tax Court case (See T.C. Memo 2007-201, p. 5 at footnote 2; A-29).

> In support of our order and decision, we **relied on** the following **deemed admissions** (paragraph number and ellipses omitted) (Emphasis added.):
>
> Petitioner Jeffrey W. Davis created a series of sham trusts designed to assist him in evading the payment of his Federal income and employment taxes.
>
> Petitioner Jeffrey W. Davis created the JLD Asset Management Trust to avoid paying his Federal taxes.
>
> The JLD Asset Management Trust is a sham trust.
>
> The Davis Charitable Trust is a sham trust.
>
> The petitioner Jeffrey W. Davis instituted this case to delay the assessment of his individual income taxes for the taxable years 1997 and 1998.
>
> The petitioner Jeffrey W. Davis instituted this case to use the Tax Court

as a forum to present frivolous constitutional and procedural arguments against the United States' Federal income tax system.

The petitioner Jeffrey W. Davis fired his attorney, Scott W. Gross, after Mr. Gross refused to file frivolous motions in connection with this case.

The petitioner Jeffrey Davis intentionally, recklessly and negligently disregarded the Federal tax laws in the preparation of his 1997 and 1998 Federal income tax returns.

(A-29).

REASONS FOR GRANTING THE PETITION

I. The United States Tax Court and the United States Sixth Circuit Court of Appeals denied Mr. Jeffrey Davis procedural due process by considering matters outside of the record in reviewing the Tax Court petition filed by Mr. Robert Alan Jones on the Davis' behalf.

After stating twice on the record that the Davises and their counsel would be held responsible **only** for the documents filed in the Tax Court in these specific docket numbers, the Tax Court acting directly

contrary to the holding in *Robinette v. Commissioner*, 439 F.3d 455 (8th Cir. 2006), rev'ing 123 T.C. 85 (2004) stepped outside of the administrative record to impose sanctions.

The Tax Court specifically referring to a previous tax court case involving Petitioner Jeffrey Davis identified him as a "tax protestor," and made specific reference to proceedings outside of both the administrative record, and the previous record for the Tax Court. The Sixth Circuit Court of Appeals then compounded that mistake with its opening remarks below: "Jeffrey and Laura Davis... are, or at least were, tax protestors."

In *Robinette, supra* the Eighth Circuit held that judicial review of nonliability issues under section 6330(d) is limited to the administrative record. Petitioners respectfully urge the Court to follow the Eighth Circuit's decision in *Robinette* in all cases arising under sections 6320 and 6330, including this case.

Petitioner's position here is that the Court is bound by both the general principles of administrative law as well as the judicial review provisions of the APA in reviewing a notice of determination. Petitioner's position is that when reviewing for abuse of discretion, the Tax Court is limited to the administrative record, and it was procedural constitutional error for the Courts to label Mr. and Mrs. Davis tax protestors based on matters totally outside the record while they were attempting to settle all of their cases within the

"system."

If the administrative record does not support the determination, then "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

The administrative record in this case, however completely discloses all of the factors that the settlement officer considered in making his determination. Nevertheless the Trial Court went outside of the administrative record in considering Mr. Davis' prior activities and reached the prejudicial conclusion he was a "tax protestor." This deprived him of due process under the Administrative Procedures Act (APA) and the Fifth Amendment to the United States Constitution.

II. The United States Tax Court and the United States Circuit Court of Appeals mistakenly ruled that Mrs. Laura Davis' claim of expiration of the assessment statute of limitations in the collection due process hearing went to the "underlying liability."

The Petitioners raised the issue of the expiration of the assessment statute of limitations as a procedural defense to the validity of assessments against both Mr. and Mrs. Davis. The defense was raised at the collection due process hearing and disposed of by the settlement officer improperly because he ruled that

inasmuch as petitioners had received a notice of deficiency from that point on a challenge to the statute of limitations is a challenge to underlying liability. This is clearly correct only in the United States **Seventh** Circuit Court of Appeals. (See *Kindred v. Commissioner*, 454 F.3d, 688, 694 (7th Cir. 2006).)

As explained *infra* the expiration of the assessment statute of limitations as to Laura Davis occurred after she decided not to petition the Tax Court for 1997 and 1998. Because she was never before the Tax Court, the issuance of a notice of deficiency to her could never have resulted in a determination of underlying liability on the merits.

The statutory notice sent to her tolled the three year statute of limitations for the 90 days set out in the letter plus an additional 60 days the IRS is allowed for processing her default decision not to petition the Tax Court. Thereafter, the normal statutory period expires in accordance with provisions of law and IRS regulations.

As a result, the IRS failure to assess Mrs. Davis for almost two years following her decision not to file a Petition in the Tax Court resulted in a time barred assessment as to her for the 1997 and 1998 tax years.

When Mr. and Mrs. Davis jointly requested a collection due process hearing, she thus had a defense to the collection of assessed taxes that may not have been available to him. This defense was in addition to and separate from her claim of "innocent spouse," and

their joint claim of double taxation or "whipsaws." The settlement officer abused his discretion in failing to entertain this claim.

Thereafter, appeal of the whipsaws, innocent spouse, and expiration of assessment statute of limitations claims for both spouses was required in order to affect a settlement. And that settlement was reached in the Tax Court case below by trading Mrs. Davis' claims for a reduction of liability of all claims of the Davis family from almost $1,700,000. to slightly over $400,000.

With respect to the issues pertinent to the 1997 and 1998 taxable years, the settlement officer's determination on the statute of limitations for assessment of Mrs. Davis' tax liability is also subject to abuse-of-discretion review, because a procedural attack on the SOL is not an attack on the underlying liability according to the IRS or most Circuits.

The term "underlying tax liability appears in section 6330(c)(2)(B), which permits taxpayers to challenge their underlying tax liability unless they have received a notice of deficiency or otherwise had an opportunity to dispute the liability. 26 U.S.C. §6330(c)(2)(B). **"Underlying tax liability" as used in section 6330(c)(2)(B) does not encompass challenges to the procedures leading to the assessment of a liability.**

Although the term "liability" is not explicitly defined in the Internal Revenue Code, it is well settled

that the existence of a liability is distinct from the act of assessment. The Internal Revenue Code imposes income tax liability based on an annual accounting period. *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359, 363 (1931) (tax liability is based on the net result of all transactions occurring during a fixed accounting period); *Edelson v. Commissioner*, 829 F.2d 828, 834 (9th Cir. 1987) ("[T]ax liabilities, though unassessed, are deemed obligations due and owing at the close of the taxable year."). Moreover, the accrual of an income tax liability is not dependent on the Service sending a notice of deficiency. *United States v. Dale*, 782 F. Supp. 615, 624 (D.D.C. 1991); *United States v. Regan*, 713 F. Supp. 629, 633 (S.D.N.Y. 1989). Nor is the accrual of a tax liability dependent on the Service making an assessment. *Goldston v. United States*, 104 F.3d 1198, 1199-1200 (10th Cir. 1997) (tax liability arises from statutory duty to pay tax, not assessment of liability); *United States v. Latham*, 754 F.2d 747, 750 (7th Cir. 1985) (assessment is an administrative determination that is not a prerequisite to tax liability); (See also *Marvel v. United States,* 719 F.2d 1507, 1514 (10th Cir. 1983) ("[T]here is no requirement in the Internal Revenue Code that before liability for employment taxes accrues, a notice of deficiency or assessment be given."). The assessment of tax is "the ascertainment of the amount due and the formal entry of that amount" on the government's books. *United States v. Dixieline Financial, Inc.*, 594 F.2d 1311, 1312 (9th Cir. 1979).

Liability and assessment are regularly distinguished throughout the Internal Revenue Code. For example, even without any assessment of a tax

liability, the United States may bring suit against any party liable for the tax to reduce the unassessed liability to judgment. Section 6501(a) of the Code makes this clear by specifying that "no proceeding in court *without assessment*" for the collection of any tax "shall be begun after the expiration of" three years from the date the applicable tax return was filed. 26 U.S.C. §6501(a). Under this statute, a collection suit may be begun either with or "without assessment" prior to the expiration of the three-year period. *Goldston v. United States*, 104 F.3d 1198, 1201 (10th Cir. 1997) (even in the "absence of assessment" the government "may still file a civil action" or "a proof of claim in a bankruptcy proceeding" to collect the tax during this initial three-year period).

It was against this statutory backdrop that Congress enacted **§6330** as part of the IRS Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685. When Congress enacts a new statutory provision, it is presumed to be aware of all previous statutory provisions covering the same subject. *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 1159 (1993); *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972). As a result, identical terms used in different provisions of the Internal Revenue Code are presumed to have the same meaning. *Commissioner v. Lundy*, 516 U.S. 235, 249-250 (1996); *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986). Further, the " 'Code must be given as great an internal symmetry and consistency as its words permits.'" *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 1159

(1993), *quoting Commissioner v. Lester*, 366 U.S. 299, 304 (1961) (internal quotation marks omitted).

Consistent with the interpretation of liability and assessment in other Internal Revenue Code sections, the interpretation of "tax liability" as used in section 6330(c)(2)(B) should limit the term to mean the amount owed under the Internal Revenue Code, and exclude from the definition the assessment of the liability and the procedural correctness of the assessment. Congress's inclusion of the word "underlying" reinforces this narrow interpretation. "Underlying" means basic or fundamental (Webster's II New College Dictionary), and its inclusion as a modifier of tax liability signifies Congressional intent that only the essential nature of the liability be an issue in the CDP hearing process. The essential nature of a tax liability does not include the assessment process.[1]

1· "Underlying tax liability" has been interpreted by the Tax Court to include "the tax on which the Commissioner based his assessment." *Robinette v. Commissioner*, 123 T.C. 85, 93 (2004), rev'd, 439 F.3d 455 (8th Cir. 2006). However, the Tax Court has also characterized this term, without analysis, to include the expiration of statutes of limitations. See *Hoffman v. Commissioner*, 119 T.C. 140 (2002) (claim that assessment statute of limitations expired is a liability challenge subject to de novo review); *Pomerantz v. Commissioner*, T.C. Memo. 2005-295 (same); *Jensen v. Commissioner*, T.C. Memo. 2004-120.. The Seventh Circuit Court of Appeals in *Kindred v. Commissioner*, 454 F.3d 688 (7th Cir. 2006), has relied upon these Tax Court decisions without analysis and has held that a challenge to the statute of limitations for making an assessment under section 6501 constitutes a challenge to the underlying liability. But see *Eby v. Internal Revenue Service*, 2006 U.S. Dist. LEXIS 14590

The very structure of §6330 further reinforces the distinction between liability and assessment. The permissibility of challenges to "the existence or amount of the underlying tax liability" is listed in §6330(c)(2)(A)) permitting the taxpayer to raise any relevant issue relating to the "unpaid tax.'" The "underlying tax liability" refers to the amount of tax a taxpayer is liable for under the Internal Revenue Code. "Unpaid tax" refers to the amount of the underlying tax liability not paid by the taxpayer that the IRS can collect administratively. To collect administratively, the tax liability must be assessed. 26 U.S.C. §§6321-6327, 6331-6344. The amount of the unpaid tax includes the validity of the assessment, the expiration of statutes of limitations, application of payments and credits, and bankruptcy discharge.

Therefore, in summary, there is a distinct division of authority as to whether for purposes of Collection Due Process Hearings (I.R.C. §§6320, and 6330) "underlying authority" includes the issue of expiration of the statute of limitations for assessment of federal taxes. This should be decided in favor of the Petitioners, because it was the essence of their appeal from the letter of determination issued by the

---

(S.D. Ohio 2006) (determination regarding expiration of collection statute of limitations is subject to abuse of discretion review). See also *Blocker v. Commissioner*, T.C. Memo. 2005-279 (challenge to validity of notice of deficiency is a challenge to underlying liability). For the reasons described in the text, the holding of these decisions, *Hoffman*, *Pomerantz*, *Jensen*, and *Blocker*, should not be followed here.

settlement officer, and was also the basis for negotiating settlement in the Tax Court. This demonstrates that the appeal to Tax Court and the petition could not be considered frivolous.

III. Mrs. Laura Davis' claim of "innocent spouse" over which the United States Tax Court had original jurisdiction was properly the subject of a petition in the Tax Court when denied by the CDPH settlement officer.

Mrs. Davis did not petition the Tax Court with respect to 1997 and 1998 deficiencies. Therefore, even if she timely received a statutory Notice of Deficiency any default against her could not be considered a decision on the merits under any circumstances. She had not waived her innocent spouse defenses.

This issue was timely raised in her request for a Collection Due Process hearing with respect to 1997 and 1998: docket #149-05L, and for 1999: docket #144-05L. Although she did not submit an innocent spouse application on the IRS Form, her request was denied. She is entitled to appeal that request to the Tax Court which by statute and case law has original jurisdiction over this issue. See IRC §6015(e), *Estate of Wenner v. C.I.R.*, 116 T.C. 284, 286, U.S.T.C. 2001:

> There are two primary jurisdictional predicates for this Court to review a claim for relief from joint and

> several liability. . . . The second jurisdictional predicate is found in section 6015(e). This section enables an electing spouse to petition for review of an administrative determination (or failure to make a determination) regarding relief from liability as a stand alone matter, independent of any deficiency proceeding.

Further, raising the issue of innocent spouse precluded summary judgment on that issue because the resolution is dependant on issues of material fact, and because it is remedial in nature, it is to be construed and applied liberally in favor of the person claiming its benefits. (See IRC §§6015(b)(1)(E), 6013(e), and *Mlay v. Internal Revenue Service*, 168F.Supp.2d 781, 786-787 (U.S.D.C. S.D. OH 2004).)

Therefore, the ruling of the Tax Court, at that of the Sixth Circuit Court of Appeals that Mrs. Davis cannot raise the innocent spouse issue in a petition from the collection due process hearing determination is wrong as a matter of law. The *Wenner* court held correctly that because the innocent spouse is entitled to petition the Tax Court directly as to her status, then an appeal from notice of determination merely supplants an original petition and actually saves the Court time, and is more efficient by combining more than one issue into a single litigation.

CONCLUSION

In summary there are three very important

federal questions wrapped into one issue which should be decided by this Honorable Court. The Tax Court and the United States Court of Appeals separated the actions of Laura Davis, and her husband Jeffrey Davis in appealing and held that because it did not agree that Jeffrey Davis had valid appellate arguments, and therefore he had no right to appeal. Further because he had no right to appeal both he and his attorney, Robert Alan Jones (also the attorney in the Tax Court for Laura Davis), were subject to sanctions. Laura Davis was not sanctioned.

In this process, the Tax Court went outside of the administrative record to a previous Tax Court case. It used unanswered discovery questions posed by government counsel to Jeffrey Davis when he was not represented by counsel to establish that he was a "tax protestor." This violated both the APA and Mr. Davis' rights to procedural due process.

The Tax Court in essence held that the petition of behalf of Laura Davis was not frivolous; therefore she was not subject to sanctions. However, the same petition and amended petition on behalf of Jeffrey Davis was frivolous; therefore, both he and his attorney were subject to sanctions.

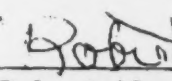
The problem with this finding is that in the absence of filing a petition on behalf of both husband and wife, a settlement could not be reached because her issues and arguments were the stronger of the two. In effect, a favorable settlement to all parties was reached based on her arguments causing the Tax Court

to vacate its previous order of summary judgment with respect to many issues.

As a final result the Sixth Circuit in an unpublished opinion (A-1) upheld the actions of the Tax Court while ignoring established law as to the administrative procedures, the assessment statute of limitations, and innocent spouse.

Based on the foregoing, Petitioners Jeffrey and Laura Davis, and their counsel, Robert Alan Jones, respectfully request this Honorable Court grant their Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,



Robert Alan Jones, DC Bar#87502
R.A.J. Limited, P.C.
1061 E. Flamingo Road, Suite 7
Las Vegas, NV 89119
Phone: 702-791-3403